Supreme Court, U.S.
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No. 01-1500

IN THE

Supreme Court of the United States

Erick Cornell Clay,

Petitioner,

v.

United States of America,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

A federal prisoner must generally file a post-conviction motion under 28 U.S.C. 2255 within one year of "the date on which [his] judgment of conviction becomes final." However, the statute does not define the term "final."

The question presented is whether petitioner's judgment of conviction became "final" within the meaning of 28 U.S.C. 2255 para. 6(1) when the court of appeals issued its mandate on direct appeal or when his time for filing a petition for a writ of certiorari expired.

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
BRIEF FOR THE PETITIONER 1
OPINION BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS AND RULES INVOLVED 1
STATEMENT 2
SUMMARY OF ARGUMENT 8
ARGUMENT 10
I. Only The Majority Interpretation of Section 2255 Comports With the Plain Meaning of "Final" and Congress's Intent. 14
II. Petitioner's Construction of Section 2255 Best Accounts for Congress's Use of the Term "Final" in Section 2244. 18
III. Only Petitioner's Interpretation Is Consistent With the Scheme Employed by Congress in Section 2263. 28
CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Alexander v. *United States*, 121 F.3d 312 (CA7 1997) 23
Anderson v. *Litscher*, 281 F.3d 672 (CA7 2002).....19
Ball v. *United States*, 470 U.S. 856 (1985) 12
Bennett v. *United States*, 119 F.3d 468 (CA7 1997) 24
Bowen v. *Roe*, 188 F.3d 1157 (CA9 1999).....19
Caspari v. *Bohlen*, 510 U.S. 383 (1994) 15
Coates v. *Byrd*, 211 F.3d 1225 (CA11 2000), *cert. denied*, 531 U.S. 1166 (2001).....19
Deal v. *United States*, 508 U.S. 129 (1993) 12
Derman v. *United States*, 298 F.3d 34, No. 01-2545, 2002 U.S. App. LEXIS 14909 (CA1 July 25, 2002).....13, 22
Duncan v. *Walker*, 533 U.S. 167 (2001) 20
Espinosa v. *Florida*, 505 U.S. 1079 (1992).....15
Feldman v. *Henman*, 815 F.2d 1318 (CA9 1987) 17
Flanagan v. *Johnson*, 154 F.3d 196 (CA5 1998) 20
Garrott v. *United States*, 238 F.3d 903 (CA7) (per curiam), *cert. denied*, 532 U.S. 1072 (2001) 8
Gendron v. *United States*, 154 F.3d 672 (1998) (per curiam), *cert. denied*, 526 U.S. 1113 (1999)..... passim
Griffith v. *Kentucky*, 479 U.S. 314 (1987).....15
Gutierrez v. *Schomig*, 233 F.3d 490 (CA7 2000), *cert. denied*, 532 U.S. 950 (2001) 8
Helvering v. *Stockholms Enskilda Bank*, 293 U.S. 84 (1934) ...20
Hill v. *United States*, 368 U.S. 424 (1962).....3, 10
Kapral v. *United States*, 166 F.3d 565 (CA3 1999) ..... passim
Kaufmann v. *United States*, 282 F.3d 1336 (CA11 2002) 12, 13, 16, 28
Kusay v. *United States*, 62 F.3d 192 (CA7 1995).....17
Lambrix v. *Singletary*, 520 U.S. 518 (1997).....15

Lindh v. *Murphy*, 521 U.S. 320 (1997).....23
Linkletter v. *Walker*, 381 U.S. 618 (1965) 8, 14
Locke v. *Saffle*, 237 F.3d 1269 (CA10 2001) 19
Mapp v. *Ohio*, 367 U.S. 643 (1961) 14
Milwaukee v. *Illinois*, 451 U.S. 304 (1981).....15
Payton v. *New York*, 445 U.S. 573 (1980).....14
Reyes-Requena v. *United States*, 243 F.3d 893 (CA5 2001).....24
Russello v. *United States*, 464 U.S. 16 (1983)..... passim
Smith v. *Bowersox*, 159 F.3d 345 (CA8 1998), *cert. denied*, 525 U.S. 1187 (1999) 20
Sorenson v. *Secretary of the Treasury*, 475 U.S. 851 (1986) 9, 20
Teague v. *Lane*, 489 U.S. 288 (1989).....14, 16
United States v. *Burch*, 202 F.3d 1274 (CA10 2000)..... passim
United States v. *Colvin*, 204 F.3d 1221 (CA9 2000).....12
United States v. *Davis*, 604 F.2d 474 (CA7 1979) 18
United States v. *Gamble*, 208 F.3d 536 (CA5 2000) (per curiam) 13
United States v. *Garcia*, 210 F.3d 1058 (CA9 2000) ..... passim
United States v. *Gordon*, 634 F.2d 638 (CA1 1980) 18
United States v. *Hayman*, 342 U.S. 205 (1952).....2, 10
United States v. *Johnson*, 457 U.S. 537 (1982).....14
United States v. *Marcello*, 212 F.3d 1005 (CA7), *cert. denied*, 531 U.S. 878 (2000) 12
United States v. *Nahodil*, 36 F.3d 323 (CA3 1994).....11
United States v. *Segers*, 271 F.3d 181 (CA4 2001), *cert. denied*, 122 S. Ct. 1331 (2002).....12
United States v. *Thomas*, 203 F.3d 350 (CA5 2000).....12
United States v. *Torres*, 211 F.3d 836 (CA4 2000).....13, 18, 21
United States v. *Willis*, 202 F.3d 1279 (CA10 2000) 12
Vasquez v. *Hillery*, 474 U.S. 254 (1986).....11

Warren v. *State*, 833 S.W.2d 101 (Tenn. Crim. App. 1992) 22

Williams v. *Artuz*, 237 F.3d 147 (CA2), *cert. denied*, 122 S. Ct. 279 (2001) 19

Statutes

18 U.S.C. 1962 22

18 U.S.C. 1963(a)(1) 22

18 U.S.C. 1963(a)(2) 22

18 U.S.C. 844(i) 4

21 U.S.C. 841(a)(1) 4

28 U.S.C. 1254(1) 1

28 U.S.C. 2244(b)(1) 23

28 U.S.C. 2244(b)(2)(B)(i) 23

28 U.S.C. 2244(b)(3)(C) 24

28 U.S.C. 2244(b)(4) 24

28 U.S.C. 2244(d)(1) ..... passim

28 U.S.C. 2244(d)(1)(A) 9, 19, 21, 22

28 U.S.C. 2254 ..... passim

28 U.S.C. 2255 ..... passim

28 U.S.C. 2255 para. 1 .....3, 10

28 U.S.C. 2255 para. 6 .....17, 19

28 U.S.C. 2255 para. 6(1) ..... passim

28 U.S.C. 2255 para. 6(2) 3, 11

28 U.S.C. 2255 para. 6(3) 3, 11

28 U.S.C. 2255 para. 6(4) 4, 11

28 U.S.C. 2255 para. 8(1) 23

28 U.S.C. 2261 29

28 U.S.C. 2263 .....1, 10, 28, 29

28 U.S.C. 2263(a) 29

28 U.S.C. 2263(b)(1) 29

28 U.S.C. 2266(b) 29

28 U.S.C. 2266(c) 29

Antiterrorism and Effective Death Penalty Act of 1996.... passim

Judiciary Act of 1789, 1 Stat. 73, 81-82 .....2, 10

Mont. Code Ann. 46-21-102(1) 22

Rules

Fed. R. App. P. 40(a)(1) 2, 4, 13

Fed. R. App. P. 41(b) 2, 4, 13, 16

Fed. R. Civ. P. 60(b) 7

Fed. R. Crim. P. 32(d)(1) 12

Rule 9(a) of the Rules Governing Section 2255 Proceedings advisory committee's note 11

Sup. Ct. R. 13.1 .....2, 5, 13, 16

Other Authorities

141 Cong. Rec. S4591-92 (daily ed. Mar. 24, 1995) 25

141 Cong. Rec. S7585 (daily ed. May 26, 1995) 26

142 Cong. Rec. H3606 (daily ed. Apr. 18, 1996) 26

2001 ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS 28

BLACK'S LAW DICTIONARY (Deluxe 7th ed. 1999) 16

Comprehensive Terrorism Prevention Act of 1995, S.735, 104th Cong. (1995) 26

H.R. Rep. No. 104-518 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924 26

Habeas Corpus Reform Act of 1995, S.623, 104th Cong. (1995) 25

THE NEW OXFORD AMERICAN DICTIONARY (2001) 12, 14

Violent Crime Control and Law Enforcement Improvement Act of 1995, S.3, 104th Cong. (1995) 24

WILLIAM BLACKSTONE, COMMENTARIES 2, 10

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinions of the court of appeals (Pet. App. 1a-6a) and district court (*id.* 7a-9a) are unpublished.

JURISDICTION

The judgment of the court of appeals was issued on January 25, 2002. The petition for a writ of certiorari was filed on April 5, 2002, and was granted on June 28, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

28 U.S.C. 2255 provides, in relevant part: "A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—(1) the date on which the judgment of conviction becomes final; * * *."

28 U.S.C. 2244(d)(1) provides, in relevant part:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; * * *.

28 U.S.C. 2263 provides, in relevant part:

> (a) Any application under this chapter [28 U.S.C. 2261-66] for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.
>
> (b) The time requirements established by subsection (a) shall be tolled—(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final

> disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review; * * *.

Federal Rule of Appellate Procedure 40(a)(1) provides, in relevant part: "Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment."

Federal Rule of Appellate Procedure 41(b) provides, in relevant part: "The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after the entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later."

Supreme Court Rule 13.1 provides, in relevant part:

> Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals * * * is timely when it is filed with the Clerk of this Court within 90 days after entry of judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

STATEMENT

1. Federal courts have had the power to issue writs of habeas corpus, "'the most celebrated writ in the English law,'" since Congress enacted the Judiciary Act of 1789, 1 Stat. 73, 81-82. See *United States* v. *Hayman*, 342 U.S. 205, 210 (1952) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *129). In 1867, Congress extended the writ – which had previously been unavailable at common law to those convicted in courts of general criminal jurisdiction – to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." *Id.* at 211. In 1948, Congress enacted 28 U.S.C. 2255, which allows federal prisoners to seek collateral review of their sentences and was "intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined." *Hill* v. *United States*, 368 U.S. 424, 427 (1962). The statute provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. 2255 para. 1.

As originally enacted, Section 2255 included no statute of limitations; "a federal prisoner had unlimited time in which to file a motion" for collateral relief. See *United States* v. *Garcia*, 210 F.3d 1058, 1059 (CA9 2000). In 1996, Congress added Paragraph 6 of Section 2255 to establish a one-year limitation period in which a federal prisoner must file any motion to vacate, set aside, or correct his sentence. This one-year limitation period begins to run on the latest of four dates, which may include "the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed" (para. 6(2)), "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review" (para. 6(3)), or "the

date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence" (para. 6(4)). In the mine-run of cases, however, Section 2255's limitation period begins to run on "the date on which the judgment of conviction becomes final" (para. 6(1)).

2. This case arises from charges that, in 1996, petitioner Erick Cornell Clay sold crack cocaine to Tammy Sue Herring, who rented a room in a South Bend, Indiana house. Pet. App. 2a. The government charged that, on October 18, 1996, as part of an apparent effort to settle Herring's outstanding debts to him, petitioner set the house on fire. *Id.* The fire severely damaged the house. *Id.*

Petitioner was indicted by a federal grand jury on charges of arson and distribution of crack cocaine in violation of 18 U.S.C. 844(i) and 21 U.S.C. 841(a)(1), respectively. Pet. App. 2a. A jury subsequently convicted petitioner of both counts, and the district court sentenced him to 137 months in prison. *Id.*

Petitioner timely appealed. In an unpublished order issued on November 23, 1998, the United States Court of Appeals for the Seventh Circuit affirmed petitioner's conviction. 165 F.3d 33 (table), No. 98-1783, 1998 U.S. App. LEXIS 30134; see Pet. App. 2a. Petitioner did not file a petition for rehearing, and, pursuant to the requirements of the Federal Rules of Appellate Procedure, the Seventh Circuit issued its mandate twenty-one days later, on December 15, 1998. See Fed. R. App. P. 40(a)(1) ("Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment."); Fed. R. App. P. 41(b) ("The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later.").

Pursuant to Supreme Court Rule 13.1, petitioner had ninety days from the Seventh Circuit's entry of judgment – *i.e.*, until February 22, 1999 – to file a petition for a writ of certiorari in this Court. He did not do so.

3. On February 22, 2000 – one year and sixty-nine days after the Seventh Circuit issued its mandate on petitioner's direct appeal, but exactly one year after the time for petitioner to file a petition for certiorari expired – petitioner filed a *pro se* motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. Petitioner alleged, *inter alia*, that his indictment was defective and his trial counsel was constitutionally ineffective.

The United States opposed petitioner's Section 2255 motion based solely on its view that the claims raised in the motion were "meritless." Gov't Response to 2255 Motion to Vacate, Set Aside, or Correct Sentence 1. The government's response did not question the timeliness of petitioner's motion. See Pet. App. 3a n.1.

On June 21, 2000, the district court filed a memorandum and order in which it indicated that petitioner's Section 2255 motion "would seem to be time-barred" under extant Seventh Circuit precedent because it was filed more than one year after the court of appeals issued its mandate in petitioner's direct appeal, and because petitioner had not filed a petition for a writ of certiorari. See App., *infra*, at 4a-5a. The district court directed the government and petitioner "to show cause why [petitioner's Section 2255] petition should not be dismissed as untimely." See *id.* 5a. It gave the government this opportunity based on its view that, on appeal, "the government would have to defend a dismissal" based on untimeliness. *Id.*

In its response to the district court's June 21, 2000 order, the government acknowledged that petitioner's Section 2255 motion was untimely under the Seventh Circuit's interpretation of the statute's limitation provision, but explained that it disagreed with that interpretation. According to the govern-

ment, petitioner's Section 2255 motion was timely because, as other courts of appeals had held, "a conviction does not become 'final' under [Section] 2255 until expiration of the time allowed for certiorari review by the Supreme Court." Gov't Resp. to June 21, 2000 Order 2 (quoting *Kapral* v. *United States*, 166 F.3d 565, 567 (CA3 1999)).

On August 2, 2000, the district court issued a memorandum and order in which it denied petitioner's Section 2255 motion as time-barred. See Pet. App. 7a-9a. Citing Seventh Circuit precedent such as *Gendron* v. *United States*, 154 F.3d 672, 674 (1998) (per curiam), *cert. denied*, 526 U.S. 1113 (1999), the district court explained that "[a]lthough other courts of appeal apply a different standard, * * * when a federal prisoner in this circuit does not seek certiorari with the United States Supreme Court, the conviction becomes 'final' on the date the appellate court issues the mandate in the direct appeal." Pet. App. 7a-8a. The district court continued:

> [Petitioner] didn't seek Supreme Court review, so he had until November 23, 1999 (one year from the date the Seventh Circuit issued the mandate in his direct criminal appeal) to file his § 2255 petition. Because [petitioner's] § 2255 petition was not filed until February 22, 2000, almost three months past this filing date, his petition is time-barred.

Id. 8a.[1]

---

[1] Although both the district court's June 21, 2000 order to show cause (App., *infra*, at 4a-5a) and its August 2, 2000 memorandum and order denying petitioner's Section 2255 motion (Pet. App. 8a & n.4) suggest that the court of appeals issued its mandate on November 23, 1998, that is not correct: the docket sheet for petitioner's direct appeal makes clear that the mandate was properly issued, as required by the Federal Rules of Appellate Procedure, on December 15, 1998. See App., *infra*, at 1a-2a (reproducing the relevant docket entries).

The district court furthermore declined to apply principles of equitable tolling to save petitioner's Section 2255 motion from dismissal. The district court explained that "[w]ithout more than a missed deadline based on an assumption that Third Circuit precedent controlled courts in the Seventh Circuit, [petitioner] cannot meet the high threshold necessary to trigger equitable tolling." Pet. App. 8a. Nor, the district court held, could petitioner challenge his conviction pursuant to Fed. R. Civ. P. 60(b) rather than Section 2255. Pet. App. 9a.

The district court accordingly dismissed petitioner's Section 2255 application as untimely (Pet. App. 9a), but granted petitioner a certificate of appealability (see *id.* 3a).

4. Petitioner timely appealed. In response to petitioner's appeal, the United States argued that the Seventh Circuit's interpretation of Section 2255's limitation provision was erroneous:

> The courts of appeals are divided over when a judgment of conviction becomes "final" under 28 U.S.C. 2255 ¶ 6(1) in cases in which the defendant files an appeal but not a petition for a writ of certiorari. The Fourth Circuit along with this circuit have held that the judgment in such cases becomes final on the date that the court of appeals issues its mandate on direct review. * * *
>
> Four other circuits have held to the contrary, that a conviction does not become final under Section 2255 until the time for filing a petition for a writ of certiorari expires. In the Department's view, the reasoning and conclusions of those latter circuits is correct.

Gov't C.A. Br. 18-19. See also *id.* 17 ("Clay argues, and the Solicitor General agrees, that his judgment of conviction did not become final until the time for filing a petition for a writ of certiorari had elapsed.").

Deeming the timeliness issue "to be dispositive of the case," the Seventh Circuit affirmed the district court's denial of petitioner's Section 2255 motion. Pet. App. 3a. The court

of appeals acknowledged that its "construction of section 2255 represents the minority view," but nonetheless "decline[d] the invitation to reconsider [its] holding in *Gendron*." *Id.* 5a. The court further noted that "[s]ince *Gendron* was decided, we have declined to revisit its holding notwithstanding the circuit split." *Id.* (citing *Garrott* v. *United States*, 238 F.3d 903 (CA7) (per curiam), *cert. denied*, 532 U.S. 1072 (2001); *Gutierrez* v. *Schomig*, 233 F.3d 490 (CA7 2000), *cert. denied*, 532 U.S. 950 (2001)). "Bowing to *stare decisis*," the court explained, it would not "overrule a recently-reaffirmed precedent without guidance from the Supreme Court." *Id.*

This Court subsequently granted petitioner's timely Petition for a Writ of Certiorari. 122 S. Ct. 2658 (2002). Advised that respondent United States declined to defend the Seventh Circuit's ruling, this Court appointed counsel to brief and argue this case as *amicus curiae* in support of the judgment below. 71 U.S.L.W. 3115 (2002).

SUMMARY OF ARGUMENT

The construction of Section 2255 advanced by petitioner and the majority of the courts of appeals to have considered the issue is the only one consistent with both the plain meaning of "final" and Congress's intent. Contrary to the view of the Fourth and Seventh Circuits, a judgment of conviction is not "final" when the appellate mandate issues, for the judgment remains subject to further review in this Court. Petitioner's construction also comports with this Court's precedents, which have repeatedly defined "final" in the context of post-conviction review as the date on which "the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed" (*Linkletter* v. *Walker*, 381 U.S. 618, 622 n.5 (1965)). There is no indication that Congress intended to deviate from this settled definition; indeed, Congress expressly relied on it in Section 2244(d)(1), which established a one-year limitation period for state prisoners to file their federal habeas corpus petitions.

Even if Congress had intended to depart from this Court's definition of "final," it is unlikely that it would have chosen the definition advanced by the Fourth and Seventh Circuits, given that the issuance of the appellate mandate – unlike the expiration of the time to seek certiorari – has little legal significance and occurs at a time at which the prisoner may still seek review in this Court.

Petitioner's interpretation of Section 2255 best accounts for Congress's use of the term "final" in Section 2244(d)(1)(A), which provides that a one-year limitation period for state prisoners to file federal habeas petitions may begin to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Because basic principles of statutory interpretation "assume that identical words used in different parts of the same act are intended to have the same meaning" (*Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986)), Congress's use of the term "final" in Section 2255 strongly suggests that a judgment of conviction becomes "final" only when review in the Supreme Court has concluded or the time to seek such review has expired. Moreover, although there is no indication that Congress intended different limitation periods to apply to federal and state prisoners, any such assumption would – in light of the states' interests in comity and finality – actually weigh in favor of a shorter limitation period for state, rather than federal, prisoners.

The Fourth and Seventh Circuits' reliance on the alleged "omission" from Section 2255 of the language included in Section 2244(d)(1)(A)'s limitation period is misplaced, as there is no relevant omission from Section 2255. If anything, it is more likely that Congress in Section 2244 identified two circumstances in which a judgment becomes final to eliminate any potential confusion created by the variable meaning of "final" under state law. In any event, the interpretation advanced by the minority circuits lacks support in either the

very principle of statutory construction on which those courts rely or the history and purpose of the AEDPA.

Finally, the Fourth and Seventh Circuits' interpretation of Section 2255 is belied by Congress's decision, in 28 U.S.C. 2263, to establish precisely the scheme that those courts contend Congress implicitly established for federal prisoners in Section 2255. Simply put, if Congress had intended that Section 2255's one-year limitation period would begin to run with the issuance of the appellate mandate but would then be tolled in the case of a prisoner filing a petition for a writ of certiorari, it would have – as it did in Section 2263 – explicitly so provided.

The judgment of the court of appeals accordingly should be reversed.

ARGUMENT

In 1789, Congress enacted the Judiciary Act, 1 Stat. 73, 81-82, which empowered federal courts to issue writs of habeas corpus, "'the most celebrated writ in the English law.'" *United States* v. *Hayman*, 342 U.S. 205, 210 (1952) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *129). For nearly eighty years, the writ was generally unavailable at common law to those convicted in courts of general criminal jurisdiction; however, in 1867, Congress extended it to apply to all cases in which "any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." *Id.* at 211. In 1948, Congress enacted 28 U.S.C. 2255, which was "intended * * * to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined" (*Hill* v. *United States*, 368 U.S. 424, 427 (1962)) and thus allows federal prisoners to move to vacate, set aside, or correct their sentences (28 U.S.C. 2255 para. 1).

Prior to 1996, Congress did not impose an explicit time limitation on Section 2255 motions. Rather, the pre-AEDPA

version of Section 2255 expressly provided that "[a] motion for such [collateral] relief may be made at any time." See, *e.g.*, Rule 9(a) of the Rules Governing Section 2255 Proceedings advisory committee's note; *Vasquez* v. *Hillery*, 474 U.S. 254, 265 (1986) (interpreting Section 2254, the corresponding rule for state prisoners seeking collateral relief); *United States* v. *Nahodil*, 36 F.3d 323, 327-28 (CA3 1994) (applying *Vasquez* to Section 2255 motion). In 1996, however, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which was expressly intended to limit the time for prisoners to seek collateral relief. See *United States* v. *Burch*, 202 F.3d 1274, 1275 (CA10 2000). Thus, Section 105 of the AEDPA (110 Stat. 1220) amended Section 2255 to impose a "1-year period of limitation" for motions for collateral relief.

Section 2255's one-year limitation period begins to run from the latest of four dates, which include

> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. 2255 para. 6(2)-(4). In most cases, however, the limitation period begins to run when a "judgment of conviction" becomes "final" (para. 6(1)) – terms that are not expressly defined in the statute.

In federal criminal practice, a "judgment of conviction" is a document, "signed by the judge and entered by the clerk" of the district court, that "set[s] forth the plea, the verdict or

findings, the adjudication, and the sentence." Fed. R. Crim. P. 32(d)(1). This Court has accordingly held that a "judgment of conviction includes both the adjudication of guilt and the sentence." *Deal* v. *United States*, 508 U.S. 129, 131 (1993). See also *Ball* v. *United States*, 470 U.S. 856, 862 (1985) ("The sentence is a necessary component of a 'judgment of conviction.'"). Consistent with the well-settled meaning of "judgment of conviction," Section 2255's limitation period thus begins to run when the prisoner's conviction and sentence become final. See *Kapral* v. *United States*, 166 F.3d 565, 569 (CA3 1999). "Final" is defined as "allowing no further doubt or dispute." THE NEW OXFORD AMERICAN DICTIONARY 633 (2001).

In cases in which a prisoner does file a timely petition for certiorari on direct appeal, the courts of appeals have consistently held that the judgment of conviction becomes final for purposes of Section 2255's limitation provision when this Court either denies the petition or affirms the conviction and sentence on the merits. See, *e.g.*, *Kaufmann* v. *United States*, 282 F.3d 1336, 1338 (CA11 2002); *United States* v. *Segers*, 271 F.3d 181, 186 (CA4 2001), *cert. denied*, 122 S. Ct. 1331 (2002); *United States* v. *Marcello*, 212 F.3d 1005, 1008 (CA7), *cert. denied*, 531 U.S. 878 (2000); *United States* v. *Thomas*, 203 F.3d 350, 354-55 (CA5 2000); *United States* v. *Willis*, 202 F.3d 1279, 1280-81 (CA10 2000); *Kapral* v. *United States*, 166 F.3d 565, 577 (CA3 1999). Cf. *United States* v. *Colvin*, 204 F.3d 1221, 1223 n.2 (CA9 2000) ("Presumably, * * * the judgment does not become final until the Supreme Court either denies the petition or until the Court's resolution of the case is acted upon by the lower courts. It would defy logic to hold that a judgment is final while an appeal is still pending before the Supreme Court."). Thus, for a federal prisoner who files a timely petition for certiorari on direct appeal, Section 2255's limitation period will begin to run on the same day regardless of the circuit in which the prisoner was convicted.

The courts of appeals have reached divergent results, however, in cases in which a prisoner does *not* file a petition for certiorari on direct review. The First, Third, Fifth, Ninth, Tenth, and Eleventh Circuits have held that Section 2255's limitation period begins to run when the time to seek certiorari expires. See, *e.g.*, *Derman* v. *United States*, 298 F.3d 34, No. 01-2545, 2002 U.S. App. LEXIS 14909, at *16 (CA1 July 25, 2002) (for purposes of AEDPA, "a conviction for a federal defendant who fails to file a petition for a writ of certiorari becomes final when the period in which he seasonably might have done so expires"); *Kaufmann*, 282 F.3d at 1338; *United States* v. *Garcia*, 210 F.3d 1058, 1060 (CA9 2000); *United States* v. *Gamble*, 208 F.3d 536, 536 (CA5 2000) (per curiam); *United States* v. *Burch*, 202 F.3d 1274, 1279 (CA10 2000); *Kapral*, 166 F.3d at 566. Under this approach, Section 2255's limitation period will thus begin to run ninety days after the entry of the court of appeals' judgment – at which time, pursuant to this Court's Rule 13.1, the time to file a petition for certiorari expires.

In contrast, however, the Fourth and Seventh Circuits have held that when a federal prisoner does *not* file a petition for certiorari on direct review, Section 2255's limitation period begins to run when the court of appeals issues its mandate. See, *e.g.*, *United States* v. *Torres*, 211 F.3d 836, 837 (CA4 2000); *Gendron* v. *United States*, 154 F.3d 672, 674 (CA7 1998) (per curiam), *cert. denied*, 526 U.S. 1113 (1999). Because the mandate will generally issue, at the earliest, twenty-one days after the entry of the court of appeals' judgment (see Fed. R. App. P. 40(a)(1) (any petition for rehearing must be filed within fourteen days after entry of judgment); Fed. R. App. P. 41(b) (when no petition for rehearing filed, mandate issues seven days after expiration of time to file such petition)), the approach of the Fourth and Seventh Circuits results in prisoners who do not seek certiorari having as many as sixty-nine fewer days in which to file their Section 2255 motions than their counterparts in the other circuits to have addressed this issue.

As petitioner now shows, only the majority view is consonant with the text of Section 2255 and Congress's intent.

I. Only The Majority Interpretation of Section 2255 Comports With the Plain Meaning of "Final" and Congress's Intent.

1. Although there are many definitions of "final," the Seventh Circuit's construction of Section 2255 in cases in which no petition for certiorari is filed – that a "judgment of conviction becomes final" when the appellate mandate issues – conflicts with the only definition that makes sense. The issuance of the appellate mandate on direct appeal simply does not "allow[] no further doubt or dispute" (THE NEW OXFORD AMERICAN DICTIONARY 633 (2001)). Rather, further correction in this Court remains a distinct possibility.

The interpretation of Section 2255 adopted by the great majority of circuits is also supported by this Court's precedents, which have frequently addressed the meaning of "finality" in the context of post-conviction review. As far back as 1965, when this Court held that the rule of *Mapp* v. *Ohio*, 367 U.S. 643 (1961), did not apply retroactively to convictions that became final before *Mapp* was decided, this Court emphasized that "[b]y final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed." *Linkletter* v. *Walker*, 381 U.S. 618, 622 n.5 (1965). See also *United States* v. *Johnson*, 457 U.S. 537, 543 n.8 (1982) (considering retroactive effect of *Payton* v. *New York*, 445 U.S. 573 (1980), and quoting *Linkletter*'s definition of "final").

This Court has consistently adhered to this definition of "final" in its retroactivity jurisprudence, holding that a case "announces a new rule" – and thus is generally unavailable to a habeas petitioner – "if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague* v. *Lane*, 489 U.S. 288, 301 (1989) (plurality). The first step in any *Teague* analysis requires the court is to determine "the date on which the defendant's conviction and

sentence became final." *Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994). In *Caspari*, this Court reiterated that a state prisoner's conviction and sentence

> become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied. The Missouri Court of Appeals denied respondent's petition for rehearing on October 3, 1985, and respondent did not file a petition for a writ of certiorari. Respondent's conviction and sentence therefore became final on January 2, 1986 – 91 days (January 1 was a legal holiday) later.

Id. at 390-91 (citing *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6 (1987)). Similarly, in *Lambrix* v. *Singletary*, which considered the retroactive effect of this Court's decision in *Espinosa* v. *Florida*, 505 U.S. 1079 (1992), this Court began its analysis by explaining that the petitioner's conviction had become final "on November 24, 1986, when his time for filing a petition for certiorari expired." 520 U.S. 518, 527 (1997).

This Court's repeated reliance on this definition of "final" in its retroactivity analysis is not merely "instructive" (*United States* v. *Burch*, 202 F.3d 1274, 1278 (CA10 2000)), but instead is directly relevant to the determination when a judgment of conviction becomes "final" for purposes of Section 2255. Specifically, with its definition of "final" for purposes of a retroactivity analysis, this Court has drawn a clear line to delineate between the stage in which a conviction and sentence are on direct review, on the one hand, and the stage in which they instead are subject to collateral attack.

Although Congress does possess "the authority to independently determine the standards to be applied under §§ 2244 and 2255" (*Gendron*, 154 F.3d at 674 (citing *Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981))), there is no in-

dication that Congress intended the term "final," as used in Section 2255, to have any meaning other than "the Supreme Court's clear definition of that term in the context of habeas review" (*Kaufmann*, 282 F.3d at 1338). To the contrary, Congress expressly relied on this Court's definition of "final" in Section 2244(d)(1)(A), where it included "the date on which the judgment become final by the conclusion of direct review or the expiration of the time for seeking such review" as one of the events triggering the limitation period. The Seventh and Fourth Circuits' definition of "final" for purposes of Section 2255, by contrast, embraces a dichotomy that Congress surely could not have intended: a prisoner's conviction could become final under Section 2255, thus triggering the statute's one-year limitation period, ninety days before the same prisoner's conviction became "final" for purposes of a *Teague* retroactivity analysis, and during which time this Court could announce a constitutional rule that would be available to that prisoner on collateral review. Such a disparity might result in prisoners "fil[ing] habeas petitions before they know of all the possible Constitutional challenges available to them." *Garcia*, 210 F.3d at 1060 (internal citations omitted).

2. Nor is there any reason that Congress would have intended to tie the "finality" of a defendant's judgment of conviction uniquely to the issuance of the appellate mandate. The date on which the mandate is issued does *not* represent the date on which the court of appeals' decision is no longer subject to challenge *even in that forum*: the deadline to seek rehearing or rehearing *en banc* is seven days *before* the mandate issues (Fed. R. App. P. 41(b)); the deadline to seek certiorari in this Court is sixty-nine days *later* (Sup. Ct. R. 13.1). The "mandate" is instead "[a]n order from an appellate court directing a lower court to take a specified action." BLACK'S LAW DICTIONARY 973 (Deluxe 7th ed. 1999). Nothing about that directive bears any intrinsic relationship to the time for seeking post-conviction review.

The Seventh Circuit's interpretation also creates the implausible anomaly that a prisoner's conviction is in "superposition," simultaneously "final" and "non-final." The court of appeals in this case held that petitioner's conviction became final on December 15, 1998, twenty-one days after it rejected petitioner's direct appeal. But on that date, it was still entirely possible that petitioner would have filed a petition for certiorari and no one would have suggested that the time to file a Section 2255 motion had begun to run. There is no reason to believe that Congress designed the time limits of Section 2255 as such a test of Schrodinger's theorem. Cf. *Kusay* v. *United States*, 62 F.3d 192, 194 (CA7 1995) (Easterbrook, J.) ("Jurisdiction is unlike quantum mechanics. Elementary particles can both exist and not exist at the same time, with uncertainty resolved only by the act of observation (this is the point of Schrodinger's cat, which is both dead and alive until the experimenter opens the box). Judicial power needs a more predictable basis. Litigants and judges should be able to know, from facts observable at the time they act, which shell covers the pea. Otherwise time, energy, and money will be wasted because later events will require hearings to be held anew and opinions rewritten.").[2]

Congress thus acted against the backdrop of the settled rule that post-conviction proceedings ought not be instituted until no further relief is available on direct review. See, *e.g.*, *Feldman* v. *Henman*, 815 F.2d 1318, 1320-21 (CA9 1987) ("A district court should not entertain a habeas corpus petition while there is an appeal pending in [the court of appeals] or in

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[2] The Seventh Circuit's construction of Section 2255 para. 6 gives rise to a similar anomaly – that the judgment of conviction is simultaneously final and non-final – upon the conclusion of proceedings in the district court. On the Seventh Circuit's view, when the district court enters the judgment, that judgment is "final," and the one-year limitation period on any Section 2255 motion begins to run. But the judgment is also non-final at that time because the prisoner may still pursue a timely direct appeal.

the Supreme Court. The reason for the rule is that disposition of the appeal may render the [habeas corpus writ] unnecessary.") (internal quotation marks and citations omitted); *United States* v. *Gordon*, 634 F.2d 638, 638-39 (CA1 1980) ("[I]n the absence of 'extraordinary circumstances,' the 'orderly administration of criminal justice' precludes a district court from considering a § 2255 motion while review of the direct appeal is still pending."); *United States* v. *Davis*, 604 F.2d 474, 484 (CA7 1979) (same). Yet, the Fourth and Seventh Circuits implausibly presume that Congress intended to abrogate that principle. On their view, a federal prisoner properly may seek, and a federal district court should decide on the merits, a Section 2255 motion at any point after the issuance of the appellate mandate on direct review. They deem the defendant's judgment of conviction "final" as of that date, despite the fact that it is entirely possible that this Court will grant certiorari and reverse the appellate judgment.

The Fourth Circuit has nonetheless opined that its contrary holding is required because "literally nothing else * * * occurs" when the ninety-day time to seek certiorari expires. *Torres*, 211 F.3d at 839. The Fourth Circuit thus adverted to the absence of any formal, legal event triggering the one-year period to file a Section 2255 motion. But the expiration of the available time to seek certiorari is itself an event of considerable legal significance. To be sure, that event differs from the issuance of a mandate in that the petitioner does not receive formal notice, but statutes of limitation are almost never triggered by the issuance of formal legal process.

II. Petitioner's Construction of Section 2255 Best Accounts for Congress's Use of the Term "Final" in Section 2244.

At the same time that Congress in the AEDPA established a one-year limitation period for federal prisoners in Section 2255, it also created, in Section 2244(d)(1), a limitation period for state prisoners seeking collateral review of their sentences pursuant to Section 2254. See *Kapral* v. *United States*, 166 F.3d 565, 573 (CA3 1999). Thus, like Section 2255, Section 2244's one-year limitation period begins to run from the latest of four dates, each of which closely parallel the four dates outlined in Section 2255, para. 6.[3] Most important for present purposes, however, Section 2244(d)(1)(A) provides that – as with Section 2255's limitation period – the one-year period will generally begin to run from "the date on which the judgment became final." The statute provides: "The limitation period shall run from the latest of—(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. 2244(d)(1)(A). The courts of appeals have consistently construed judgments to be "final" for purposes of Section 2244(d)(1)(A), thereby triggering the one-year limitation period, when review in the Supreme Court has concluded or the time to seek such review has expired. See, *e.g.*, *Anderson* v. *Litscher*, 281 F.3d 672, 674-75 (CA7 2002); *Locke* v. *Saffle*, 237 F.3d 1269, 1273 (CA10 2001); *Williams* v. *Artuz*, 237 F.3d 147, 148-49 (CA2), *cert. denied*, 122 S. Ct. 279 (2001); *Coates* v. *Byrd*, 211 F.3d 1225, 1226 (CA11 2000), *cert. denied*, 531 U.S. 1166 (2001); *Bowen* v. *Roe*, 188 F.3d 1157, 1158-59 (CA9 1999); *Kapral* v. *United States*, 166 F.3d 565,

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[3] See 28 U.S.C. 2244(d)(1) ("The limitation period shall run from the latest of—(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant is prevented from filing by such State action; (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.").

575 (CA3 1999); *Smith* v. *Bowersox*, 159 F.3d 345, 348 (CA8 1998), *cert. denied*, 525 U.S. 1187 (1999).

Basic principles of statutory construction "assume[] that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (internal quotations omitted). That conclusion is particularly apt with respect to the time limits of Sections 2254 and 2255: As the Fifth Circuit noted in *Flanagan* v. *Johnson*, 154 F.3d 196, 200 n.2 (1998), not only are "§ 2255 and § 2254 actions themselves * * * quite similar," such that they "should generally be read *in pari materia*," but "the limitation provisions for § 2255 motions and § 2254 petitions are virtually identical." Congress's use of the term "final" in both Section 2244(d)(1) and Section 2255 thus strongly suggests that a judgment becomes "final" for purposes of Section 2255 para. 6(1), thereby triggering the start of the one-year limitation period, only when review in the Supreme Court has concluded or the time to seek such review has expired. Moreover, the facts that Sections 2244 and 2255 both deal with the same issue – the limitation period for seeking collateral review – have the same purpose (see *Flanagan*, 154 F.3d at 200 n.2), and were enacted contemporaneously, are "especially damaging to any claim that 'the words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent'" *Sorenson*, 475 U.S. at 860 (quoting *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934))).

Although there is no reason to believe that Congress would have wanted to treat state and federal prisoners differently with regard to the limitation periods for seeking collateral relief pursuant to Sections 2254 and 2255, the only possible exception would be the fact that Section 2254 implicates the interest of the states in comity and the finality of their courts' judgments (see, *e.g.*, *Duncan* v. *Walker*, 533 U.S. 167 (2001)), such that Congress could conceivably have wanted

the limitation period for Section 2254 petitions to begin running *earlier*. The approach of the Fourth and Seventh Circuits, however, produces the opposite result: a potentially *longer* limitation period for state prisoners.[4]

2. In adopting the contrary view – that a conviction becomes "final" for purposes of Section 2255 para. 6(1) when the court of appeals issues its mandate on direct appeal – the Seventh Circuit relied heavily on this Court's reasoning in cases such as *Russello* v. *United States*, 464 U.S. 16 (1983), that when "Congress includes particular language in one section of an act but omits it in another section of the same act, it is presumed that Congress intended to exclude the language, and the language will not be implied where it has been excluded." *Gendron*, 154 F.3d at 674.

a. The Seventh Circuit erred because there is no relevant omission from Section 2255. Rather, as explained above, Congress in Section 2254 identified two circumstances in which a conviction becomes "final" and limited finality in the state post-conviction context to those two instances. If the omission suggests anything at all, it is that the "finality" under Section 2255 is not as constrained.

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[4] The Fourth Circuit's contrary reading of the statute simply rests on a false premise. That court reasoned in *Torres*: "The language Congress used [in Section 2244], 'by [i] the conclusion of direct review *or* [ii] the expiration of the time for seeking such review,' *expands the period of time* before the start of the limitation period for filing a habeas petition beyond the date that marks the conclusion of direct review of that judgment." 211 F.3d at 840 (emphasis added). The Fourth Circuit further reasoned that it was significant that Congress had not provided for a parallel "expan[sion]" of time in Section 2255. *Id.* In reality, however, the second clause of Section 2244(d)(1)(A) – "the expiration of time for seeking such review" – does not necessarily represent a date that is later in time. Whenever a petition for certiorari *is* filed, the latest date is instead "the conclusion of direct review."

Congress's specific directive in Section 2244(d)(1)(A) that the one-year limitation period will begin to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" is instead likely attributable to the lack of consensus among various states regarding the meaning of "finality." Compare, *e.g.*, *Warren* v. *State*, 833 S.W.2d 101, 102 (Tenn. Crim. App. 1992) (when state prisoner had not appealed conviction, "the statute of limitations [for seeking post-conviction relief] begins to run from the date of final conviction") with Mont. Code Ann. 46-21-102(1) (for purposes of state habeas proceedings, using definition of "finality" similar to that of 28 U.S.C. 2244(d)(1)(A)). In light of this lack of consensus, Congress may have "chose[n] to ensure uniformity by explaining what 'final' means in the context of a federal habeas petition that seeks to challenge a state court conviction." *Derman* v. *United States*, 298 F.3d 34, No. 01-2545, 2002 U.S. App. LEXIS 14909, at **15-16 (CA1 July 25, 2002). By contrast, the concept of "finality" "has a well-defined meaning in federal law." *Id.* at *15.

b. In any event, the *Russello* principle "is 'based on the hypothesis of careful draftsmanship.'" *Burch*, 202 F.3d at 1277 (citing *Kapral*, 166 F.3d at 579 (Alito, J., concurring)). In *Russello*, this Court interpreted 18 U.S.C. 1963(a)(1), which required any person convicted of violating Section 1962 of the Racketeering Influenced and Corrupt Organizations chapter to forfeit "any interest he has acquired or maintained in violation of section 1962." The petitioner argued that the statute "reache[d] only 'interests in an enterprise' and [did] not authorize the forfeiture of mere 'profits and proceeds.'" 464 U.S. at 20. This Court disagreed, based not only on its understanding of the meaning of the broad term "interest" but also on its comparison of the subsection with another provision in the same statute: Section 1963(a)(2), which required forfeiture only of "any interest in * * * any enterprise which [the defendant] has established[,] operated, controlled, conducted, or participated in the conduct of, in violation of

section 1962." This Court declined to "conclude[e] * * * that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship." *Id.* at 23.

In reaching its conclusion, this Court in *Russello* cited the legislative history of the two subsections, noting that an earlier version of the RICO legislation "had a single forfeiture provision for § 1963(a) that was limited to 'all interest in the enterprise'" but "later was divided into the present two subsections and the phrase 'in the enterprise' was excluded from the first. Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Id.* at 23-24.

The "hypothesis of careful draftsmanship" is sorely lacking in this case. This Court's recognition that, "in a world of silk purses and pigs' ears, the [AEDPA] is not a silk purse of the art of statutory drafting" (*Lindh* v. *Murphy*, 521 U.S. 320, 336 (1997)) has particular force with respect to Sections 2244 and 2255. For example, Section 2255 para. 8(1)'s requirement that a second or successive motion "must be certified as provided in section 2244 * * * to contain," *inter alia*, "newly discovered evidence" apparently is intended to incorporate the more stringent requirement, set out in Section 2244(b)(2)(B)(i), that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." Similarly, Section 2255 does not specifically prohibit claims presented in a prior petition; rather, such claims are prohibited only by implication, through the incorporation of Section 2244(b)(1). Accord *Alexander* v. *United States*, 121 F.3d 312, 314 (CA7 1997) ("The reference [in Section 2255] to § 2244 also activates an additional limit in that section: 'A claim presented in a second or successive * * * application * * * that was presented in a prior application shall be dismissed.'"). Courts have further construed Section 2255 as incorporating various procedural require-

ments established in Section 2244(b). See, *e.g.*, *Reyes-Requena* v. *United States*, 243 F.3d 893, 897 (CA5 2001) (Section 2255 incorporates Sections 2244(b)(3)(C) – which conditions authorization to file a second or successive petition on a prima facie showing of the petition's adequacy – and 2244(b)(4), which requires a district court to dismiss claims in an authorized second or successive petition "unless the applicant shows that the claim satisfies the requirements of" Section 2244); *Bennett* v. *United States*, 119 F.3d 468, 469-70 (CA7 1997) (Posner, C.J.) (same; court notes that "the legislative history does not distinguish between second or successive motions by federal and by state prisoners, and we cannot think of any reason why the standard for federal prisoners would be more stringent").

Further, unlike the provisions at issue in *Russello*, nothing in the legislative history indicates that Congress ever intended to create different limitation periods for federal and state prisoners.

A predecessor proposal to the AEDPA, the Violent Crime Control and Law Enforcement Improvement Act of 1995, included an amendment to Section 2255 that was, for present purposes, identical to the one eventually implemented by the AEDPA – that is, it created a limitation period for Section 2255 motions that would have run from the latest of four dates, including "the date on which the judgment of conviction becomes final." S.3, 104th Cong. § 508 (1995) (hereinafter "S.3"). The bill also proposed to amend Section 2244 to impose a one-year limitation period for state prisoners to file federal habeas petitions. However, although three of the four dates from which the limitation period could begin to run largely paralleled those eventually implemented by the AEDPA,[5] the limitation period would have begun to run not

[5] The one-year limitation period would have begun to run from, *inter alia*:

when the judgment became final, but instead from "the date on which State remedies are exhausted." S.3, 104th Cong. § 508.

A subsequent proposal, the Habeas Corpus Reform Act of 1995, S.623, similarly included the limitation period later adopted in the AEDPA for Section 2255 motions. S.623, 104th Cong. § 6(2) (1995). S.623's proposed amendment to Section 2244 differed from that of S.3, however, in that it – like the AEDPA – provided for the limitation period to begin to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," rather than from "the date on which State remedies are exhausted." S.623, 104th Cong. § 2 (1995). In his remarks introducing the bill, Senator Specter (one of the bill's co-sponsors) emphasized that the proposed changes were necessary to "impose strict time limits on appeals," and to "address the endless delays caused by requiring defendants to exhaust all of their claims in State court before they are allowed to file federal habeas corpus petitions." 141 Cong. Rec. S4591-92 (daily ed. Mar. 24, 1995). "Based on these remarks, it is reasonable to infer that the reason for the new approach taken in S.623 was to force state prisoners, upon the completion of direct review, promptly to commence

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(2) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, where the applicant was prevented from filing by such State action;

(3) the date on which the Federal constitutional right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is made retroactively applicable; or

(4) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

S.3, 104th Cong. § 508 (1995).

either a state post-conviction relief proceeding (which would toll the limitation period) or a federal habeas proceeding." *Kapral*, 166 F.3d at 580-81 (Alito, J., concurring).

In April 1995, Senators Dole and Hatch introduced the Comprehensive Terrorism Prevention Act of 1995, S.735, 104th Cong. (1995). The bill included the habeas corpus reform provisions proposed in S.623 (see, *e.g.*, 141 Cong. Rec. S7585 (daily ed. May 26, 1995)), and the version that eventually passed in both houses and was signed into law as the AEDPA proposed changes to Section 2244 and 2255's limitation periods that were virtually identical to those contemplated by S.623. At no point was there any indication that Congress intended that the limitation periods for federal and state prisoners begin running at different times, much less that federal prisoners have a shorter time in which to seek collateral review. To the contrary, the Conference Report for S.735 indicates only that the bill "sets a one year limitation on an application for a habeas writ * * * ." H.R. Rep. No. 104-518, at 11 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 944. See also 142 Cong. Rec. H3606 (daily ed. Apr. 18, 1996) ("I introduced this legislation * * * to impose a statute of limitations on the filing of habeas corpus petitions.") (statement of Rep. Hyde).

Thus, as Judge Alito concluded in his concurring opinion in *Kapral*, "the legislative history suggests that this difference in language" was not a deliberate choice by Congress to impose different limitation periods for federal and state prisoners," but was "instead a product of the vagaries of the legislative process." 166 F.3d at 581.

In any event, the Fourth and Seventh Circuits' interpretation of the limitation period prescribed by Section 2255 conflicts with the *Russello* principle – *viz.* that courts should not imply statutory language contained in a related provision when it has been omitted by Congress. Those courts hold that, in cases in which no petition for certiorari is filed, a conviction becomes final upon the issuance of the court of appeals' mandate on direct review – *i.e.*, upon "the conclusion of direct review." Yet, under the *Russello* principle, the fact that Congress employed that meaning of "finality" in Section 2254 would preclude its application to Section 2255. As the Tenth Circuit noted in *United States* v. *Burch*, "[h]ad the *Gendron* court truly applied the *Russello* principle and taken it to its logical conclusion, it would have held that a judgment of conviction is final for purposes of § 2255 when the trial court enters the judgment of conviction on the docket." 202 F.3d 1274, 1278 (2000). Accord *United States* v. *Garcia*, 210 F.3d 1058, 1060 (CA9 2000) (O'Scannlain, J.) ("[T]he canon of construction invoked by the Seventh Circuit does not apply because we cannot avoid implying at least part of the language from § 2244(d)(1) into § 2255.").

c. At bottom, the premise underlying the Fourth and Seventh Circuits' contrary reading of the statute is that Congress intended to interpose the shortest possible deadline for seeking review under Section 2255. But, as noted, that view is belied by Section 2244, under which state prisoners have one year from the expiration of the time to seek certiorari before filing motions under Section 2254. Further, nothing in the legislative history articulates the intent that the Fourth and Seventh Circuits attribute to Congress. "The 'Great Writ' occupies far too important a place in our jurisprudence to justify" the Fourth and Seventh Circuits' assumption to the contrary. See *Kapral* v. *United States*, 166 F.3d 565, 573 (CA3 1999).

d. Finally, the interpretation advanced by petitioner, the United States, and five courts of appeals is entirely consistent with the purpose of the AEDPA: "to constrain the filing of habeas petitions by imposing a time limitation where none existed before." *Burch*, 202 F.3d at 1276 (citing *Kapral*, 166 F.3d at 571 & n.4)). If a federal prisoner does not file a petition for a writ of certiorari, and Section 2255's limitation period begins to run when the time for seeking certiorari expires, it is beyond peradventure that the "time limitation"

which was at the very heart of the AEDPA is in place: the prisoner must file any Section 2255 motion within one year of the expiration of the time for seeking certiorari. "Recognizing that one is allowed 90 days to file a petition for certiorari does not mitigate the congressional objective of imposing time limits where none previously existed." *Kapral*, 166 F.3d at 571.

Indeed, petitioner's interpretation of Section 2255 not only serves the purposes of the AEDPA, but it also allows federal prisoners, like their state counterparts, to make an informed decision whether to file a petition for a writ of certiorari and the likelihood of any such petition's success, without the concern that their failure to seek certiorari will then reduce the time in which to seek collateral review of their conviction and sentence. Accord *Kaufmann* v. *United States*, 282 F.3d 1336, 1338 (CA11 2002). By contrast, the Seventh and Fourth Circuits' interpretation of Section 2255 may encourage federal prisoners "to file plainly frivolous petitions for certiorari for the sole purpose of extending their time for habeas review" (*id.*), thereby further burdening this Court with additional meritless petitions for certiorari from the more than ten thousand federal prisoners who seek direct review of their convictions and sentences in the courts of appeals each year (see 2001 ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, tbl. B-1A).

III. Only Petitioner's Interpretation Is Consistent With the Scheme Employed by Congress in Section 2263.

If the Fourth and Seventh Circuits were correct that Congress intended the time to seek post-conviction review to commence when the court of appeals' mandate issued on direct review, it would have used the scheme it employed in 28 U.S.C. 2263. That section sets out an expedited limitation period for commencing post-conviction review in capital

cases from states that meet certain criteria.[6] Under Section 2263(a), prisoners subject to that provision must file any application for federal habeas relief "not later than 180 days after *final* State court *affirmance* of the conviction and sentence on direct review or the expiration of the time for seeking such review" (emphasis added). Section 2263(b)(1) further tolls the 180-day limitation period "from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition."[7]

Section 2263 thus sets up a scheme very similar to the one that the Fourth and Seventh Circuits imagined Congress created in Section 2255. Section 2263 expressly directs, in those cases to which it applies, that the time to seek post-conviction review runs from the final appellate ruling prior to any disposition by this Court. Congress then allowed for review in this Court by tolling the 180-day limitation period while a petition for certiorari is pending. By contrast, Congress provided in Section 2255 that the one-year time to seek post-conviction review runs *not* from "final * * * affirmance of the conviction and sentence on direct review" (Section 2263(a)) but rather from "the date on which the judgment of conviction becomes final" (Section 2255 para. 6(1)). "Had Congress intended the limitations period to begin upon the conclusion of an appeal

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[6] Sections 2261-66 collectively form Chapter 154, "Special Habeas Corpus Procedures in Capital Cases," of Title 28. Pursuant to Chapter 154, states may trigger certain procedural rules – including a shorter limitation period in which state prisoners may file a federal habeas petition (28 U.S.C. 2263(a)) and expedited decisions by federal courts (*id.* § 2266(b)-(c)) – by creating a system to appoint counsel for capital defendants in state post-conviction proceedings that meets specified requirements. See 28 U.S.C. 2261.

[7] The tolling provision applies if the "State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review." 28 U.S.C. 2263(b)(1).

as of right, it would have provided for tolling to allow for a petition for certiorari to be acted upon, just as it did in [Section 2263(b)(1)]." *Kapral*, 166 F.3d at 576-77.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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September 11, 2002

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Filed 3/30/98]

GENERAL DOCKET FOR NO. 98-1783

United States of America,
Plaintiff-Appellee,

v.

Erick Cornell Clay,
Defendant-Appellant.

SELECTED DOCKET ENTRIES

DATE	PROCEEDINGS
3/30/98	Criminal case docketed. [98-1783] [1047245-1] Transcript information sheet due 4/9/98. Appellant's brief due 5/11/98 for Erick Cornell Clay. (land)
3/30/98	Filed Appellant Erick Cornell Clay docketing statement. [98-1783] [1047253-1] (land)
10/9/98	Case heard and taken under advisement by panel: Circuit Judge Jesse E. Eschbach, Circuit Judge Ilana D. Rovner, Circuit Judge Diane P. Wood. [98-1783] [1111564-1] (broo)

11/23/98	Filed Circuit Rule 53 order PER CURIAM. AFFIRMED. Circuit Judge Jesse E. Eschbach, Circuit Judge Ilana D. Rovner, Circuit Judge Diane P. Wood. [98-1783] [1047245-1] (jame)
11/23/98	ORDER: Final judgment filed per C.R. 53 order. With costs: n. [98-1783] [1122050-1] (jame)
12/15/98	MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 1 vol. pleadings; 2 vol. transcripts; 1 vol. exhibits; 2 sealed envelopes.) [98-1783] [1047245-1] (cove)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ERIC[K] C. CLAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Cause No. 3:00CV117RM
Arising from 3:97CR46RM

MEMORANDUM AND ORDER

This cause comes before the court on plaintiff Erick C. Clay's motion under 28 U.S.C. § 2255, together with his petition for leave to amend his § 2255 petition.

Mr. Clay was sentenced on March 18, 1998 to concurrent terms of 137 months for arson and distribution of a Schedule II controlled substance, to be followed by a three-year period of supervision. The United States Court of Appeals for the Seventh Circuit affirmed his conviction and sentence on November 23, 1998. Mr. Clay filed his § 2255 petition on February 22, 2000, claiming he was denied the effective assistance of trial counsel and that the indictment for arson was defective. In his amended § 2255 petition Mr. Clay seeks to add claims that his sentence violates the Ex Post Facto Clause and the Fifth Amendment of the United States Constitution and that he received ineffective assistance of counsel during his plea bargaining stage.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which became effective April 24, 1996,

contains a one-year statute of limitations for petitions filed pursuant to 28 U.S.C. § 2255. The one-year period runs from the latest of:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255.

When a federal prisoner does not seek certiorari with the Supreme Court, the conviction becomes "final" on the date the appellate court issues the mandate in the direct appeal. *See Gendron v. United States*, 154 F.3d 672, 674 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1758 (1999); *see also United States v. Marcello*, Nos. 99-2294, 99-2451, 2000 WL 580669, at *2 (7th Cir. May 15, 2000) ("For defendants who try unsuccessfully to take their case to the Supreme Court, their judgments of conviction become final on the date their petitions for certiorari are denied."); *United States v. Torres*, 211 F.3d 836, 838-841 (4th Cir. 2000). *But see United States v. Garcia*, 210 F.3d 1058-1060 (9th Cir. 2000); *United States v. Gamble*, 208 F.3d 536, 536-537 (5th Cir. 2000); *United States v. Burch*, 202 F.3d 1274, 1279 (10th Cir. 2000); *Kapral v. United States*, 166 F.3d 565, 577 (3d Cir. 1999). Nothing indicates that Mr. Clay sought Supreme Court review. The

clerk of the court of appeals sent the mandate to this court on December 15, 1998; the mandate bore the date of November 23, 1998, which was also the date of the appellate decision. Therefore, at least according to the record before the court, Mr. Clay had until, at the latest, December 15, 1999 to file his § 2255 petition. Because Mr. Clay's § 2255 petition was not filed until February 22, 2000, more than two months past this filing date, Mr. Clay's petition would seem to be time-barred.[1] His proposed amendment to the petition (if the amendment itself would be capable of surviving a timeliness analysis) would not seem likely to make the original petition any more or less timely.

This timeliness issue was not raised in the government's response. Fairness demands that Mr. Clay have an opportunity to be heard on the issue. The issue's absence may be due to the government's awareness of some matter that makes the present appearance misleading; since the government would have to defend a dismissal on these grounds on appeal, fairness demands that the government, too, have an opportunity to be heard on the issue. Accordingly, the court AFFORDS the parties twenty days – to and including July 11, 2000 – within which to show cause why Mr. Clay's petition should not be dismissed as untimely.

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[1] Where a petitioner's conviction became final prior to the enactment of the AEDPA, the petitioner had until April 23, 1997, one year from the AEDPA's enactment, to file his motion under 28 U.S.C. § 2255. *See Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), reversed on other grounds, 117 S. Ct. 2059 (1997). Because Mr. Clay's conviction occurred well after the enactment date of the AEDPA, Mr. Clay is not entitled to any grace period for filing his § 2255 petition.

SO ORDERED.

ENTERED: June 21, 2000

Robert L. Miller, Judge
United States District Court

cc: AUSA Hays
Clay